UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In the Matter of the Complaint of ROBERT L. STANTON as Owner of the Vessel "MISTY LADY" for Exoneration from or Limitation of Liability	)	Civil Action No. 02-10408-GAO
THE CONTINENTAL CASUALTY COMPANY, as Subrogee of Ronald Showalter, Michael Giombetti, and W.F. King, Plaintiff, v. NORTHSIDE MARINA AT SESUIT HARBOR, INC., JOSEPH S. BUSCONE, as Trustee of the Northside Marina Trust, and FAITH BUSCONE, as Trustee of the Northside Marina Trust, Defendants.	)	Civil Action No. 04-11872-GAO

MEMORANDUM AND ORDER
August 18, 2005

O'TOOLE, D.J.

The parties to this consolidated admiralty action seek to assign liability for damages resulting from a fire at a marina on Cape Cod, Massachusetts. The fire began on Robert L. Stanton's vessel and quickly spread to other vessels docked at the marina. Stanton initiated this action by filing a complaint for exoneration or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 181, et seq., and Rule F of the Supplemental Rules for Certain Admiralty and Maritime

Claims. His complaint led to a flurry of claims, counterclaims, and crossclaims involving the marina, the trust that owns the real property at the marina, other boat owners, and the subrogees of boat owners whose boats were either damaged or destroyed in the fire. Pending before me are numerous discovery, evidentiary, summary judgment, and other miscellaneous motions, which I resolve below after a brief recitation of the pertinent facts that are not subject to genuine dispute.

I. Summary of Undisputed Facts

At approximately 7:45 p.m. on August 30, 2001, a fire broke out aboard Robert Stanton's vessel, MISTY LADY, which was docked in a slip on C-dock at the Northside Marina at Sesuit Harbor in East Dennis, Massachusetts. Stanton was not aboard the vessel when the fire started. William Henchy, who had returned to the marina from a fishing trip about an hour before, was on board another boat, SUPPLEMENT, three boats away from the MISTY LADY.

Someone saw smoke coming from MISTY LADY and shouted, "Fire." Employees of the marina and other persons present began moving some of the nearby boats into the channel and away from the fire. Henchy started up the SUPPLEMENT and piloted it to safety. His own boat, LEVIATHAN, remained docked next to where the SUPPLEMENT had been, and two boats away from the burning MISTY LADY. An employee of the marina picked up a hose on C-dock and sprayed water on a boat docked next to the MISTY LADY to try to prevent the fire from spreading. The fire department quickly arrived on the scene, but the fire had already spread to some of the other boats on C-dock. Before it could be completely extinguished, the fire had caused damage to between eight and eleven boats,[1] as well as docks and other property of the marina. Stanton's MISTY LADY

[1] The Report of Investigation from the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives indicated that eight boats were damaged, while the Investigative Synopsis from the Massachusetts State Police indicated that eleven boats were damaged.

was a total loss. Henchy's LEVIATHAN caught fire and sank at the dock. The OUTRAGE, owned by Larry Zarella, was one of the boats moved safely away from the fire. Zarella boarded his vessel shortly after it was recovered and found a candle burning on the step leading into the cabin and a slightly burned paper towel. The candle was identified by Stanton as resembling candles kept on his boat.

After an investigation by federal, state, and local law enforcement agencies, agents from the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives formed the opinion that the fire on the MISTY LADY was incendiary in nature and started as a result of an unknown person or persons applying an open flame to an available combustible object. Officers from the Dennis Police Department and the Massachusetts State Police formed the opinion that Henchy was responsible for setting two separate fires, one on the stairs of the MISTY LADY and one on the stairs of the OUTRAGE, because he had had the "motive, means and exclusive opportunity" to do so. Investigators ruled out any involvement by Stanton in the starting of the fire. Notwithstanding the lengthy, multi-agency investigation, no grand jury indictment was sought and no one was ever charged criminally in connection with the fires.

Owners of vessels docked at the marina, including Henchy and Stanton, had entered into written contracts with Northside Marina at Sesuit Harbor, Inc. ("Northside" or "Northside Marina") to rent slips at the marina from May 1, 2001 through October 31, 2001 (the "Summer Dockage Contract"). The Summer Dockage Contract required all boat owners, or "tenants," to have their boats insured "by complete marine coverage including liability." Henchy called his insurance company the day after the fire to report his loss. He was informed a few days later that he did not have coverage for his boat because he had not paid the premium on the policy.

The Summer Dockage Contract also prohibited "open fires of any kind" on boats in the marina. Stanton possessed candles on his boat, which investigators believed were the source of the fire on the MISTY LADY.

The following liability related provisions were also included in the Summer Dockage Contract: "Each Tenant will be held responsible for damage he may cause to other boats in the Marina or the structures or facilities thereof," and "All reasonable precautions will be taken by the Marina to ensure the Tenant's property and safety. However, the Marina assumes no responsibility for the safety of any vessel docked in the Marina and will not be liable for fire, theft or damage to said vessel, its equipment or any property in or on said vessel, however arising."

II. Motions to Strike

Because resolution of the motions to strike may affect the summary judgment analysis, I will consider these motions first.

A. Henchy's Motion to Strike Parts of the Affidavit of Joseph Buscone and the Buscones' Affirmative Defense Relying on a "Commercial Landlord" Relationship, and to Preclude the Buscones' Reliance on a Lease Between Northside and the Northside Marina Trust (Dkt. No. 125)

In support of their motion for summary judgment, Joseph and Faith Buscone, who are the co-trustees of the Northside Marina Trust, which owns the land and buildings at the marina, argue that the Northside Marina Trust is a commercial landlord and that Northside Marina is its tenant. As a result, they say, the trust is not liable for any injuries caused by the marina's negligence.

Henchy has countered with a motion to strike the Buscones' commercial landlord defense based on spoliation of evidence. Henchy argues that Northside Marina and Joseph and Faith Buscone intentionally destroyed a lease which may have evidenced a commercial landlord relationship between Northside Marina (as tenant) and the Northside Marina Trust (as landlord). Joseph Buscone admits

that a lease was accidentally thrown out by "the girl that works in [Northside's] office" after it was requested by Henchy in discovery, but he says that its destruction was not intentional and, in any event, tax records and check registers produced demonstrate the existence of a lease relationship.

Even absent bad faith, if evidence is destroyed through carelessness and the other side is prejudiced, a court is entitled to consider imposing sanctions. Sacramona v. Bridgestone/Firestone, Inc., 106 F.3d 444, 447 (1st Cir. 1997). Here, sanctions are not warranted because the absence of the lease does not prejudice Henchy. Whether or not this purported lease would assist the Buscones in proving the existence of a commercial landlord-tenant relationship is of no moment because both Northside and the Buscones are entitled to summary judgment for reasons independent of their business relationship. See discussion, infra, Part IV.C. The motion is denied.

B. Henchy's Motion to Strike the Entire Opposition of Northside Marina to Henchy's Motion for Summary Judgment as Being in Violation of Fed. R. Civ. P. 56(e), 56(g), and L.R. 56.1 (Dkt. No. 134)

Henchy has failed to demonstrate a violation of Fed. R. Civ. P. 56 or Local Rule 56.1 warranting the relief sought by this motion. The motion is denied.

C. Henchy's Motion to Strike Trooper Peters' Investigative Synopsis and the ATF's Report of Investigation (Dkt. No. 137)

Henchy moves to exclude from evidence the Report of Investigation from the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF Report") and the Investigative Synopsis from the Massachusetts State Police ("Trooper Peters' Report") as hearsay not subject to any exception and improper opinion testimony. Northside and the Buscones argue that the reports are admissible under Fed. R. Civ. P. 803(8)(C) as interpreted by the Supreme Court in Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988). The motion is granted in part and denied in part.

In Beech Aircraft, the Court held that investigatory reports of this nature and the statements contained in the reports are admissible if they are based on a factual investigation and the report, or any portion that is admitted, is sufficiently trustworthy. 488 U.S. at 170; see also Lubanski v. Coleco Indus., Inc., 929 F.2d 42, 45 (1st Cir. 1991). "Trustworthiness in this context refers to matters such as whether the evidence is self-authenticating or contemporaneously compiled by a person of adequate skill and experience." Blake v. Pellegrino, 329 F.3d 43, 48 (1st Cir. 2003). In determining whether an investigative report is trustworthy a court may consider, among other factors, "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." Beech Aircraft, 488 U.S. at 168 n.11.

Even if a police report itself would be generally admissible, it does not necessarily follow that every statement contained in the report is admissible. See United States v. Mackey, 117 F.3d 24, 28 (1st Cir. 1997) ("In line with the advisory committee note to Rule 803(8), decisions in this and other circuits squarely hold that hearsay statements by third persons . . . are not admissible under this exception merely because they appear within public records."); Parsons v. Honeywell, Inc., 929 F.2d 901, 907 (2d Cir. 1991) ("It is well established that entries in a police report which result from the officer's own observations and knowledge may be admitted but that statements made by third persons under no business duty to report may not.") (quoting United States v. Pazsint, 703 F.2d 420, 424 (9th Cir. 1983)) (emphasis added in Parsons); Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990) ("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment.").

Henchy disputes the trustworthiness of the two investigative reports, which are offered by Northside and the Buscones to show at least a genuine issue of material fact concerning who is responsible for the fire at the marina. Henchy bears the burden of satisfying the court that they are untrustworthy and should be excluded. In re Nautilus Motor Tanker Co., 85 F.3d 105, 113 (3d Cir. 1996); Lubanski, 929 F.2d at 45-46. In an attempt to carry this burden, Henchy argues that the reports: (i) contain inadmissible hearsay and double hearsay; (ii) contain uncorroborated and repudiated statements; (iii) are undated (Trooper Peters' Report) or dated more than thirteen months after the fire (the ATF Report); (iv) are not based on personal knowledge; (v) are preliminary and not final; and (vi) are prepared by investigators who lack the skill and experience to handle marine arson investigations.

While the reports appear to have been compiled or prepared in a generally trustworthy and reliable manner by unbiased investigators with sufficient skill and experience to handle this kind of investigation, the reports are not entitled to a blanket admission. In Trooper Peters' Report, paragraphs 2, 3, 6 (sentences 6-10), 8, 10, and 11 contain hearsay within hearsay not subject to any exception and conclusions based on these hearsay statements. These portions of the report are inadmissible. (Statements of witnesses attached to Peters' report are also inadmissible). In the portion of the ATF Report submitted on December 7, 2001, paragraphs 8, 9, 10, 11, 12, 18, 19, 20, and 22 contain hearsay within hearsay not subject to any exception and these portions of the report are inadmissible. Likewise, the portions of the ATF Report submitted on September 30, 2002 and October 7, 2002 contain inadmissible hearsay and will be excluded, except for the "Synopsis" at the beginning of each submission.

I note, however, that even if I were to allow the investigative reports into evidence in their entirety, the evidence in the summary judgment records fails as a matter of law to demonstrate that, more likely than not, Henchy was responsible for the fire at the marina. See discussion, infra, Part IV.B.

D. Henchy's Motion to Strike Particular Materials Submitted by Northside Marina in Opposition to Henchy's Motion for Summary Judgment (Dkt. No. 141)

I make the following rulings with respect to each of the challenged pieces of evidence:

1. Deposition of Trooper Michael Peters, pp. 76-77; 122-37: The motion is granted as to the hearsay statements of what Zarella and Halloran told Peters. Zarella's account of the events is detailed in his affidavit and Halloran's in his deposition.

2. Deposition of Robert Tucker, day one (8/16/04), pp. 158-59: The motion is denied. Captain Tucker personally observed the barnacle growth and later learned that the boat had not been used.

3. Deposition of Robert Kurisko, day two, pp. 65-69: The motion is denied, as the testimony concerns Kurisko's observations and conclusions from an investigation in which he personally took part.

4. Deposition of Jeffrey Perry, pp. 79-84: The motion is granted because Perry's expert-like conclusions lack the proper foundation, are pure speculation, and he was not a person acting under a duty to report this kind of information.

5. Northside Ex. D (Trooper Peters' Report): See Part II.C, supra.

6. Northside Ex. E (Buscone Aff.): See Part II.A, supra.

7. Northside Ex. O (ATF Report): See Part II.C, supra.

8. Northside Ex. Q (Statement of Heidi Schadt): The motion is granted because this statement is inadmissible hearsay.

9. Paragraphs 7-9 and 11 of Northside's Disputed Material Facts: The motion is denied. These paragraphs are supported by those portions of the investigative reports that are admissible and the affidavits and deposition testimony of witnesses placing Henchy in the vicinity of the fire.

10. Paragraph 13 of Northside's Disputed Material Facts: The motion is granted and paragraph 13 of Northside's Disputed Material Facts is stricken. Northside cannot honestly dispute the fact that the ATF closed its file on March 18, 2004 and neither the attorney general nor the district attorney indicted anyone or presented a case to the grand jury.

11. Paragraph 14 of Northside's Disputed Material Facts: The motion is granted. See Part II.E, infra.

12. Paragraph 15 of Northside's "Additional Material Facts": The motion is granted to the extent this statement relies on inadmissible portions of Trooper Peters' Report, see discussion, supra, Part II.C, but is otherwise denied.

13. Paragraph 16 of Northside's "Additional Material Facts": The motion is granted to the extent this statement relies on inadmissible portions of Trooper Peters' Report, see discussion, supra, Part II.C, but is otherwise denied.

14. Paragraph 17(d) of Northside's "Additional Material Facts": The motion is granted to the extent this statement relies on the inadmissible statement of Heidi Schadt. See Part II.D.8, supra.

15. Paragraph 17(g) of Northside's "Additional Material Facts": The motion is denied. See Part II.D.2, supra.

16. Paragraph 17(h) of Northside's "Additional Material Facts": The motion is granted. See Part II.D.4, supra.

17. Paragraph 18 of Northside's "Additional Material Facts": The motion is granted to the extent this statement relies on inadmissible portions of Trooper Peters' Report and the ATF Report, see discussion, supra, Part II.C, and inadmissible portions of Peters' deposition testimony, see discussion, supra, Part II.D.1, but is otherwise denied.

E. Northside's Motion to Strike the Polygraph Examination Offered by Henchy in Support of His Motion for Summary Judgment (Dkt. No. 153)

Northside moves to strike the results of a polygraph exam administered to Henchy by Thomas F. Donlan III on May 17, 2004. The motion is granted because the probative value of the exam is outweighed by the danger of unfair prejudice and the exam is of questionable reliability. Any evidence submitted by Northside regarding Henchy's refusal to take a polygraph test administered by law enforcement is also excluded. See deVries v. St. Paul Fire and Marine Ins. Co., 716 F.2d 939, 944-45 (1st Cir. 1983).

F. Northside's Motion to Strike Newspaper Articles and a Press Release Relied Upon by Henchy and Other Parties (Dkt. No. 155)

The Motion is granted. The motion is unopposed by any party and the materials are inadmissible hearsay.

III. Henchy's Motion to Compel Production of Documents by Northside Marina Trust (Dkt. No. 135)

Henchy contends that the Northside Marina Trust has refused to produce certain documents in response to Henchy's Rule 30(b)(6) deposition notices dated August 16, 2004 and November 23, 2004. Henchy requests permission to require Joseph and Faith Buscone to submit to further examination under oath after producing these documents, if necessary. The Buscones say they have produced all of the documents requested and the motion is moot.

Before Henchy filed this motion to compel, he moved for summary judgment on his own behalf and filed an opposition to Northside's and the Buscones' motions for summary judgment without asserting any objection under Fed. R. Civ. P. 56(f). If the requested documents were not produced and were essential to any of Henchy's claims or defenses he should have filed his motion to compel earlier. The motion to compel is denied.

IV. Motions for Summary Judgment

A. Stanton's Motion for Summary Judgment (Dkt. No. 99)

Stanton moves for summary judgment on his claim for exoneration or limitation of liability and on Northside Marina's claim against him for damage to the marina's docks.[2] As Northside has no reasonable expectation of proving that Stanton is subject to liability under the terms of the Summer Dockage Contract, Stanton is entitled to summary judgment on these claims.

Paragraph four of the Summer Dockage Contract provides, in part, "Each Tenant will be held responsible for damage he may cause to other boats in the Marina or the structures or facilities

[2] Henchy and Standard Fire Insurance Company ("Standard") have stipulated to the dismissal of their claims against Stanton, leaving only Northside Marina with a claim against Stanton. Standard and The Continental Casualty Company ("Continental") are subrogated to the rights of insured boat owners whose vessels were damaged or destroyed by the fire.

thereof." (emphasis added). The "Tenant" is the boat owner, not the boat. It is undisputed that Stanton himself is not responsible for damage resulting from the fire at the marina. Rather, Northside contends that Henchy started the fire on Stanton's boat. Northside's argument that Stanton may still be held liable for damages that are caused by, originate from, or are otherwise connected to his vessel, even though Stanton was not present on the vessel at the time of the fire, is an erroneous interpretation of the clear contract language.

Northside's argument that Stanton breached the Summer Dockage Contract by maintaining candles on his vessel which were used to start the fire at the marina is also unpersuasive. Paragraph nineteen of the Summer Dockage Contract prohibits "open fires of any kind" on boats in the marina. Absent any evidence that Stanton lit or maintained any open fires in the marina, his possession of unlit candles aboard the MISTY LADY was not a breach.

Stanton's motion for summary judgment is granted both as to his claim for exoneration of liability and Northside's claim against him. As discussed below, Stanton is not, however, entitled to summary judgment on his offensive claims against Northside and the Buscones for breach of contract, breach of and/or negligent bailment, breach of the covenant of good faith and fair dealing, breach of warranty, negligence, contribution, and indemnification. See discussion, infra, Part IV.C.

B. Henchy's Motion for Summary Judgment (Dkt. No. 93)

Henchy moves for summary judgment on all claims asserted against him by Northside Marina and Joseph and Faith Buscone.[3] Henchy contends that no rational jury could conclude by a preponderance of the evidence that he was responsible for the fire at the marina, and consequently, he is entitled to judgment as a matter of law. I agree.

[3] Stanton and Continental previously dismissed their claims against Henchy.

There is no direct evidence, whether physical or testimonial, tending to show that Henchy started the fire. The circumstantial evidence relied on by Northside and the Buscones to prove that fact is as follows: Upon returning from their fishing trip around 6:30 p.m. on the day of the fire, Henchy told his crewmate, Jerry Sullivan, to go home instead of staying and helping Henchy clean the SUPPLEMENT like Sullivan usually did. Henchy stayed and cleaned the SUPPLEMENT, which was docked three boats away from the MISTY LADY.

When the fire broke out on the MISTY LADY around 7:45 p.m., Henchy was alone aboard the SUPPLEMENT. Henchy piloted the SUPPLEMENT to the fuel dock away from the fire, but he did not move his own boat, LEVIATHAN, which was docked next to the SUPPLEMENT and two boats away from the burning MISTY LADY. The fire spread to the LEVIATHAN and the vessel sank at the dock.

Henchy took out a loan at the time he purchased the LEVIATHAN in 1993. From approximately 1997 through 1999, Henchy had some difficulties meeting all of his loan obligations related to the LEVIATHAN. In August 2001, Henchy was offering the LEVIATHAN for sale.

Henchy had insured the LEVIATHAN under a policy he first obtained in 1993 or 1994. On more than one occasion, Henchy's policy was cancelled for failure to pay the premium, and then was later reinstated upon payment. Henchy's insurance policy was automatically renewed in June or July 2001, but he failed to pay the premium. The day after the fire, Henchy called his insurance agent, Donald Cianciolo, to report his loss and left him a voice message. On September 4, 2001, Cianciolo informed Henchy that there was no coverage for the LEVIATHAN because Henchy had not paid the premium on his insurance policy. That same day Henchy went to Cianciolo's office and requested copies of papers related to his insurance. Cianciolo testified that during one of their phone

conversations on September 4 Henchy indicated that he liked the looks of Cianciolo's boat at the Sandwich (Massachusetts) Marina, and this conversation made Cianciolo uncomfortable. Cianciolo gave a Sandwich police officer a call and asked him to watch out for his boat during routine patrols.

Detective Kurisko of the Dennis Police Department interviewed Henchy two days after the fire and thought that his behavior was "very unusual." He stated that Henchy was stuttering and his body was shaking. Henchy asked Detective Kurisko how he would handle the arrest of the person responsible for the fire because Henchy, who is an attorney, wanted to sue him. Henchy also asked Detective Kurisko if he knew the best way to scuttle a boat and Henchy started explaining the procedure.

Based on the evidence in the summary judgment record, viewed in the light most favorable to Northside and the Buscones, one might harbor a hunch that Henchy had something to do with the starting of the fire, but no reasonable inference can be drawn that more likely than not he was responsible. The opinions of Trooper Peters and Detective Kurisko that Henchy ignited the fire on the MISTY LADY reflect their suspicions and are pure conjecture. The opinions are not a rational basis for believing Henchy was responsible for the fire. See Demoranville v. Star Ins. Co. of America, 65 N.E.2d 315, 316 (Mass. 1946). Even if I were to admit into evidence the entirety of the law enforcement reports and all of the evidence excluded in Part II, supra, the case against Henchy is simply too weak to survive summary judgment. Henchy's motion for summary judgment is granted.

C. Northside Marina's Motion for Summary Judgment (Dkt. No. 104) and The Buscones' Motion for Summary Judgment (Dkt. No. 106)

1. *The Exculpatory Clause*

Northside Marina argues that the Summer Dockage Contract contains an exculpatory clause that relieves it of all liability for the claims asserted against it. Paragraph nine states: "All reasonable precautions will be taken by the Marina to ensure the Tenant's property and safety. However, the Marina assumes no responsibility for the safety of any vessel docked in the Marina and will not be liable for fire, theft or damage to said vessel, its equipment or any property in or on said vessel, however arising."

Absent a relevant statute, federal maritime law governs the interpretation of this clause. Sander v. Alexander Richardson Invs., 334 F.3d 712, 716 (8th Cir. 2003); La Esperanza de Puerto Rico, Inc. v. Perez y Cia. de Puerto Rico, Inc., 124 F.3d 10, 16-17 (1st Cir. 1997). See also Persson v. Scotia Prince Cruises, Ltd., 330 F.3d 28, 32 (1st Cir. 2003) ("State law may supplement maritime law whe[n] maritime law is silent . . ., but state law may not be applied where it is materially different than maritime law, or where it would defeat the reasonably settled expectations of maritime actors.") (quoting Windsor Mount Joy Mut. Ins. Co. v. Giragosian, 57 F.3d 50, 54 (1st Cir. 1995)).

At oral argument, Henchy's attorney argued that the statutory prohibition against exculpatory clauses in real property rental agreements in Mass. Gen. Laws ch. 186, § 15 renders the clause in the Summer Dockage Contract void as against the public policy of Massachusetts. I disagree. The Summer Dockage Contract is not the kind of lease or rental agreement contemplated by Mass. Gen. Laws ch. 186, § 15 . Despite the contract's use of the terms "tenant" and "rental," Northside Marina

and the boat owners did not enter into a traditional landlord-tenant relationship. The Summer Dockage Contract simply allows boat owners to dock their boats at a slip in the marina for a fee – akin to an agreement to use a horse stall at a race track. See Minassian v. Ogden Suffolk Downs, Inc., 509 N.E.2d 1190, 1192 (Mass. 1987) (rejecting application of Mass. Gen. Laws ch. 186, § 15 and enforcing release in stall agreement).

The status of exculpatory clauses in maritime contracts under federal maritime law is unclear. The First Circuit has recently observed: "While exculpatory clauses – commonly referred to as red letter clauses – were traditionally disfavored by courts sitting in admiralty, see, e.g., Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) (refusing to enforce a clause absolving a towing company from all liability for its negligent acts), such clauses are today routinely enforceable." La Esperanza, 124 F.3d at 19. More precisely, perhaps, some such clauses are routinely enforced. According to the First Circuit, exculpatory clauses in marine contracts are enforceable provided they are expressed clearly, entered into freely by parties of equal bargaining power, and do not provide for a total absolution of liability. Id.[4] Here, the exculpatory clause in the Summer Dockage Contract was sufficiently clear and not the product of overreaching. Northside's promise in the first sentence of paragraph nine to take "reasonable precautions . . . to ensure the Tenant's property and safety" is consistent with its ordinary tort duty of care and does not render ambiguous the second sentence's limitation on liability. In addition, there was nothing preventing the boat owners from attempting to

[4] The exculpatory clause in the ship repair contract in La Esperanza prevented the shipowner from recovering "damages resulting from any loss of use or profit of the vessel." 124 F.3d at 14. The shipowner was, however, awarded damages resulting from the shipyard's negligence in performing the repair work, in an amount corresponding to the cost needed to repair the vessel and return it to the condition it was in before it entered the shipyard. Id. at 15. Thus, the exculpatory clause in the repair contract in La Esperanza precluded recovery for certain kinds of damages but did not provide for a total absolution of liability.

negotiate the terms of the Summer Dockage Contract or refusing to enter into the contract and docking, mooring, or otherwise keeping their vessels at some other location. See Sander, 334 F.3d at 720; In re Wechsler, 121 F. Supp.2d 404, 434 (D. Del. 2000). The more difficult question is whether the exculpatory clause in the Summer Dockage Contract provides for a total absolution of liability, and if so, whether it is nonetheless enforceable in this type of slip rental contract.

A party will not be allowed to invoke an exculpatory clause to escape liability for gross negligence. La Esperanza, 124 F.3d at 19 ("harm wilfully inflicted or caused by gross or wanton negligence operates to invalidate an exemption from liability.") (citations and internal quotations omitted).[5] And though it appears that marine repair contracts should provide for potential liability sufficient to deter ordinary negligence, see id., it is unclear in this circuit if slip rental agreements can absolve a party from liability for ordinary negligence.[6] I need not decide this question, however, because, as set forth below, I conclude that Northside Marina is entitled to judgment in its favor on the merits of each of the claims asserted against it.

2. *Negligence*

The negligence claims against Northside and Joseph and Faith Buscone, as trustees of the Northside Marina Trust, are premised on the marina's and the trustees' alleged failure to provide adequate security for the tenants' property and adequate fire detection and suppression equipment on the night of the fire. Stanton, Henchy, Standard, and Continental contend that if the marina had

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[5] The parties have not brought claims for gross negligence against Northside.

[6] In Sander, the Eighth Circuit enforced an exculpatory clause in a slip rental agreement which afforded the marina total absolution from "any and all liability." The court did so by distinguishing marine repair contracts, like those in La Esperanza, from slip rental agreements, and by limiting the prohibition on total absolution of liability to circumstances involving relationships similar to towage agreements, such as bailment, employment, or public service relationships. 334 F.3d at 719.

adequate security and fire detection and suppression equipment, the fire aboard the MISTY LADY could have been detected and extinguished early enough to prevent substantial damage.

Northside's and the Buscones' standard of care is not alleged to arise out of any statute, regulation, permit, or "special relationship" between the boat owners and the marina. Cf. Ranger Ins. Co. v. Exxon Pipeline Co., 760 F. Supp. 97, 99 (W.D. La. 1990); Addis v. Steele, 648 N.E.2d 773, 776 (Mass. App. Ct. 1995).[7] Because the risk of a fire at the marina was reasonably foreseeable, Northside owed the boat owners a duty of reasonable care under the circumstances. 1 Thomas J. Schoenbaum, Admiralty and Maritime Law, § 5-2 (4th ed. 2004).

The negligence theory depends on the proposition that the fire suppression equipment at the marina was unreasonably insufficient. Henchy claims there was no fire fighting equipment located on the dock itself. (There was apparently a "garden hose" on C-dock but no "fire hose.") Henchy also testified that the fire-fighters had difficulty locating a fire hydrant when they arrived on the scene.

There is no evidence of any violation of fire regulations. Captain Robert Tucker of the Dennis Fire Department, who performed periodic inspections of Northside Marina, testified that the marina had fire extinguishers and that the distance between them appeared to be "within the range of recommendations." Captain Tucker did not say whether those fire extinguishers were on the docks or were in good working order.

Even if the (relatively meager) facts regarding the nature and availability of security and fire fighting systems are viewed in the light most favorable to Stanton, Henchy, Standard, and Continental, the deficiency in their theory is that a jury would have no way to judge the reasonableness of those systems. The claimants proffer no expert in fire suppression techniques to

[7] I decline to find that a bailment relationship existed. See discussion, infra, Part IV.C.3.

say that conditions at the marina fell below approved practices or standards. Indeed, the only evidence from a fire-fighting professional was Captain Tucker's, and that evidence tended more to establish that the facilities were adequate, not inadequate. Without some guidance from persons with relevant experience, the jury would necessarily be required to speculate about what ordinary prudence requires of a marina like Northside. It is simply not within the range of ordinary lay experience to know what size hoses would be reasonable, or how many fire extinguishers at what distance from one another ordinary prudence calls for, or what other facilities might reasonably substitute for any lack in either of the former two, etc. An unguided determination by a jury would be literally standardless and consequently arbitrary. See Schoenbaum, supra ("A finding of negligence must not be based upon speculation or conjecture.").

Furthermore, even under a standard of ordinary prudence, on the evidence in the summary judgment record, a rational inference cannot be drawn that, more likely than not, the damage caused to the vessels was due to Northside's or the Buscones' negligence in not providing adequate security or fire detection and suppression equipment. See Smith v. Reinauer Oil Transp., Inc., 256 F.2d 646, 651 (1st Cir. 1958). Nor have the parties shown that the presence of particular fire suppression equipment in any particular array would have made any difference in preventing the damage caused to their property.

Northside and the Buscones are entitled to judgment in their favor on the negligence claims asserted against them.

3. *Bailment*

A bailment is "the delivery of goods by their owner to another for a specific purpose, and the acceptance of those goods by the other, with the express or implied promise that the goods will be returned after the purpose of the delivery has been fulfilled." Goudy & Stevens, Inc. v. Cable Marine, Inc., 924 F.2d 16, 18 (1st Cir. 1991). Bailment relationships are often found when a boat is left with a marina for storage or repairs and the marina is given exclusive right to possession of the vessel. See, e.g., Id.; In re Wechsler, 121 F. Supp.2d at 437-38; Commercial Union Ins. Co. v. Bohemia River Assocs., 855 F. Supp. 802, 805 (D. Md. 1991); Royal Ins. Co. v. Marina Indus., 611 N.E.2d 716, 717 (Mass. App. Ct. 1993). But where, as here, the marina simply provides docking space to the boat owners and is not given the exclusive right to control the vessels, no bailment relationship is created. Id. Northside and the Buscones are entitled to summary judgment on the bailment claims directed at them.

4. *Breach of Contract, Breach of Warranty, Breach of Covenant of Good Faith and Fair Dealing*

Stanton, Henchy, and Standard assert duplicative claims against Northside and the Buscones for breach of contract, breach of warranty, and breach of the covenant of good faith and fair dealing for failing to take all reasonable precautions to ensure the safety of the boats at the marina, as required by the Summer Dockage Contract. The contract requires reasonable care under the circumstances. As noted above, absent any reliable standard upon which to judge the reasonableness of Northside's or the Buscones' actions, these claims improperly invite speculation and conjecture and cannot survive summary judgment.

5. *Contribution and Indemnification*

Because Northside and the Buscones are entitled to judgment as a matter of law on the claims asserted against them, Stanton's and Henchy's claims for contribution and indemnification also fail.

V. Motion for Order of Prejudgment Security and to Join Buscone Family, LLC as a Party Defendant (Dkt. No. 150)

In this joint motion, Stanton, Henchy, Standard, and Continental seek an order (1) joining Buscone Family, LLC as a party defendant pursuant to Rule 18(b), and (2) allowing the attachment of real property against Buscone Family, LLC and Joseph and Faith Buscone in the amount of $993,375.38, or in the alternative, requiring Joseph and Faith Buscone to deposit this amount with the Court pending entry of final judgment. As Northside and the Buscones are entitled to summary judgment, this motion is denied.

VI. Henchy's Motion to Stay Decision on Northside's Motion for Summary Judgment (Dkt. No. 165)

In this motion, Henchy asks the Court to stay consideration of Northside's motion for summary judgment in light of an alleged conflict of interest which he says has prejudiced him. The conflict relates to the law firm of Looney & Grossman's dual representation of Northside's insurer, Hanover Insurance Company, and Henchy, prior to Henchy's termination of the firm in October 2004. Briefly stated, attorney Wesley Chused at Looney & Grossman provided a coverage opinion letter to Hanover Insurance Company in October 2001 indicating that no bailment existed between Northside Marina and any of the boat owners. In August 2002, attorney Bertram Snyder at Looney & Grossman filed negligent bailment claims against Northside on behalf on Henchy which, of course, are premised on the existence of a bailment relationship between Northside and Henchy. Henchy argues that Northside's counsel, Lawson & Weitzen, and Hanover Insurance Company knew of this

conflict of interest but failed to tell him, and he should now be permitted time to examine how this may have prejudiced him in the prosecution of his claims.

I have carefully considered the alleged conflict and any prejudice it may have on Henchy and conclude that the motion ought to be denied. Though the allegations should be of particular concern to Looney & Grossman, all parties have had a full and fair opportunity to present their arguments concerning any bailment relationship and, as stated above, I conclude as a matter of law that no such relationship existed between Northside and the boat owners.

VII. Conclusion

Based on the foregoing, I make the following rulings on the pending motions in this matter:

1) Henchy's Motion for Summary Judgment (Dkt. No. 93) is GRANTED.

2) Stanton's Motion for Summary Judgment (Dkt. No. 99) is GRANTED.

3) Northside Marina's Motion for Summary Judgment (Dkt. No. 104) is GRANTED.

4) The Buscones' Motion for Summary Judgment (Dkt. No. 106) is GRANTED.

5) Henchy's Motion to Strike Parts of the Affidavit of Joseph Buscone and the Buscones' Affirmative Defense Relying on a "Commercial Landlord" Relationship, and to Preclude the Buscones' Reliance on a Lease Between Northside and the Northside Marina Trust (Dkt. No. 125) is DENIED.

6) Henchy's Motion to Strike the Entire Opposition of Northside Marina to Henchy's Motion for Summary Judgment as Being in Violation of Fed. R. Civ. P. 56(e), 56(g), and L.R. 56.1 (Dkt. No. 134) is DENIED.

7) Henchy's Motion to Compel Production of Documents by Northside Marina Trust (Dkt. No. 135) is DENIED.

8) Henchy's Motion to Strike Trooper Peters' Investigative Synopsis and the ATF's Report of Investigation (Dkt. No. 137) is GRANTED IN PART and DENIED IN PART.

9) Henchy's Motion to Strike Particular Materials Submitted by Northside Marina in Opposition to Henchy's Motion for Summary Judgment (Dkt. No. 141) is GRANTED IN PART and DENIED IN PART.

10) Motion for Order of Prejudgment Security and to Join Buscone Family, LLC as a Party Defendant (Dkt. No. 150) is DENIED.

11) Northside's Motion to Strike the Polygraph Examination Offered by Henchy in Support of His Motion for Summary Judgment (Dkt. No. 153) is GRANTED.

12) Northside's Motion to Strike Newspaper Articles and a Press Release Relied Upon by Henchy and Other Parties (Dkt. No. 155) is GRANTED.

13) Northside's and the Buscones' Motion for Leave to File a Reply Brief in Further Support of Their Motions for Summary Judgment (Dkt. No. 158) is GRANTED NUNC PRO TUNC.

14) Henchy's Motion to Stay Decision on Northside's Motion for Summary Judgment (Dkt. No. 165) is DENIED.

It is SO ORDERED.

August 18, 2005 \s\ George A. O'Toole, Jr.

DATE DISTRICT JUDGE